BRIEF IN SUPPORT OF PETITION

The majority opinion of the Circuit Court of Appeals (R. 37) and Judge Hutcheson's dissenting opinion (R. 40) are reported in 135 F. (2d) 51. The opinion of the District Court (R. 21) is reported in 39 F. Supp. 297.

Statement of the Case

This action was brought on a bond (R. 3) which petitioner Pan American Airways, Inc. was required to furnish as a condition to obtaining clearance papers pending a determination of its liability for the payment of any fines which might be imposed in the course of its operations for violation of the immigration laws. This bond was required pursuant to Rule 5A2 issued by the Secretary of Labor under the authority of Section 7 (d) of the Air Commerce Act, which provided that aircraft when arriving from non-contiguous territory should be treated as vessels.

The Secretary of Labor found that, on February 3, 1935, Pan American Airways, Inc. had transported by aircraft from Nassau, Bahamas to Miami, Florida an alien afflicted with tuberculosis, in violation of Section 9 of the Immigration Act of 1903, as amended, and directed the payment of a $1,000 fine. The fine was not paid, and action was brought against petitioners as principal and surety on the bond.

The case was decided on the pleadings (on demurrers to the declaration, and on a motion to strike the pleadings thereto—R. 13, 21). No question of fact is involved. It is conceded that there was a violation, and the only question presented is the source and extent of the liability therefor, as set forth in the Summary Statement (petition, pp. 1-4).

Specification of Errors

The Circuit Court of Appeals erred:

1. In holding that Section 9 of the Immigration Act of 1903, as amended, is applicable to air transportation without the necessity of any regulation under the Air Commerce Act of 1926.

2. In holding that Section 11(b) of the Air Commerce Act of 1926 does not limit to $500 the penalty to which petitioners are subject.

3. In affirming the judgment of the District Court.

Statutes and Regulations

Section 9 of the Immigration Act of 1903, As Amended (Acts of March 3, 1903, c. 1012, § 9, 32 Stat. 1215; Feb. 5, 1917, c. 29, § 9, 39 Stat. 880; May 26, 1924, c. 190, § 26, 43 Stat. 166; 8 U. S. C. A. § 145).

The first sentence of Section 9, which is more particularly here involved, provides (8 U. S. C. A. § 145):

> "It shall be unlawful for any person, including any transportation company other than railway lines entering the United States from foreign contiguous territory, or the owner, master, agent, or consignee of any vessel, to bring to the United States either from a foreign country or any insular possession of the United States any alien afflicted with idiocy, insanity, imbecility, feeble-mindedness, epilepsy, constitutional phychopathic inferiority, chronic alcoholism, tuberculosis in any form, or a loathsome or dangerous contagious disease, and if it shall appear to the satisfaction of the Attorney General that any alien so brought to the United States was afflicted

with any of the said diseases or disabilities at the time of foreign embarkation, and that the existence of such disease or disability might have been detected by means of a competent medical examination at such time, such person or transportation company, or the master, agent, owner, or consignee of any such vessel, shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of $1,000, and in addition a sum equal to that paid by such alien for his transportation from the initial point of departure, indicated in his ticket, to the port of arrival, for each and every violation of the provisions of this section, such later sum to be delivered by the collector of customs to the alien on whose account assessed."

At the time of the offense here involved, in 1935, the above statute referred to the Secretary of Labor rather than to the Attorney General, but otherwise was the same as it is now.

Section 7 of the Air Commerce Act of 1926 (Act of May 20, 1926, c. 344, § 7, 44 Stat. 572, 49 U. S. C. A. § 177).

This Section, subdivision (d)(3) of which is more particularly here involved, provides (49 U. S. C. A. §177):

"§177. *Application of existing laws relating to foreign commerce*

"(a) *Application of navigation and shipping laws to aircraft.* The navigation and shipping laws of the United States, including any definition of 'vessel' or 'vehicle' found therein and including the rules for the prevention of collisions, shall not be construed to apply to seaplanes or other aircraft or to the navigation of vessels in relation to seaplanes or other aircraft.

"(b) *Designation of ports of entry; detail of officers; application of customs and public health laws.*

The Secretary of the Treasury is authorized to (1) designate places in the United States as ports of entry for civil aircraft arriving in the United States from any place outside thereof and for merchandise carried on such aircraft, (2) detail to ports of entry for civil aircraft such officers and employees of the customs service as he may deem necessary, and to confer or impose upon any officer or employee of the United States stationed at any such port of entry (with the consent of the head of the Government department or other independent establishment under whose jurisdiction the officer or employee is serving) any of the powers, privileges, or duties conferred or imposed upon officers or employees of the customs service, and (3) by regulation to provide for the application to civil air navigation of the laws and regulations relating to the administration of the customs and public health laws to such extent and upon such conditions as he deems necessary.

"(c) *Application of laws relating to entry and clearance of vessels.* The Secretary of Commerce is authorized by regulation to provide for the application to civil aircraft of the laws and regulations relating to the entry and clearance of vessels to such extent and upon such conditions as he deems necessary.

"(d) *Designation of ports of entry for aliens; detail of officers; application of laws relating to immigration.* The Attorney General [Note: formerly Secretary of Labor] is authorized to (1) designate any of the ports of entry for civil aircraft as ports of entry for aliens arriving by aircraft, (2) detail to such ports of entry such officers and employees of the immigration service as he may deem necessary, and to confer or impose upon any employee of the United States stationed at such port of entry (with the consent of the head of the Government department or other independent establishment under

whose jurisdiction the officer or employee is serving) any of the powers, privileges, or duties conferred or imposed upon officers or employees of the immigration service, and (3) by regulation to provide for the application to civil air navigation of the laws and regulations relating to the administration of the immigration laws to such extent and upon such conditions as he deems necessary."

Section 11(b) of the Air Commerce Act of 1926 (Act of May 20, 1926, c. 344, § 11(b), 44 Stat. 574).

This section originally provided, so far as is here material, as follows:

> "(b) Any person who (1) violates any provision of subdivision (a) of this section or any entry or clearance regulation made under section 7, or (2) any customs or public health regulation made under such section, or (3) any immigration regulation made under such section, shall be subject to a civil penalty of $500 which may be remitted or mitigated by the Secretary of Commerce, the Secretary of the Treasury, or the Secretary of Labor, respectively, in accordance with such proceedings as the Secretary shall by regulation prescribe. * * *"

Certain amendments which are immaterial for present purposes were subsequently made (Act of June 19, 1934, c. 656, § 2, 48 Stat. 1116; Act of June 23, 1938, c. 601, § 1107(i)(9), 52 Stat. 1029; 49 U. S. C. A. § 181(b)).

Rule 5A2 of the Immigration Laws and Rules of January 1, 1930.

This Rule, as in force at the time of the offense here involved, was entitled "Rule 5—Application of the Immigration Laws and Regulations to Civil Air Navigation as Authorized by the Air Commerce Act of 1926," and provided:

"Par. 2. Civil aircraft engaged in foreign air commerce and bringing passengers from Canada or Mexico shall, for the purpose of the Immigration Laws and Regulations, except as herein provided for, be regarded as are other common carriers bringing aliens to border ports of entry from such countries. (Sec. 1.)

"All other civil aircraft engaged in foreign commerce shall, for the purpose of the Immigration Laws and Regulations, except as otherwise provided, be treated as vessels. (Sec. 2.)"

Rule 5G1 of the Immigration Laws and Rules of January 1, 1930.

This Rule, as in force at the time of the offense here involved, provided, so far as is here material, as follows:

"For a violation of any of these regulations, unless the penalty for such violation is otherwise provided for by immigration laws and general regulations, the civil penalty of $500 authorized by section 11, paragraph b, Air Commerce Act of 1926, will be enforced. * * *"

The amended version of the above regulation, referred to at the conclusion of Judge Hutcheson's dissenting opinion, was not issued until after the offense here in question (1941 Supplement to Code of Federal Regulations of the United States, Title 8 Aliens and Nationality, § 116.60(a)).

Summary of Argument

I. Section 9 of the Immigration Act of 1903 does not apply of its own force to air transportation.

(a) The expressed intent of Section 7 of the Air Commerce Act of 1926 is that the immigration laws, even if by their terms applicable to air transportation,

shall apply only if and to the extent determined by regulations of the Secretary of Labor.

(b) Section 9 of the Immigration Act of 1903 is not by its terms fairly applicable to the present case.

II. Since liability arises solely from the regulation made by the Secretary of Labor under the provisions of Section 7 of the Air Commerce Act, the maximum penalty of $500 provided in Section 11(b) of that Act applies.

ARGUMENT

I. Section 9 of the Immigration Act of 1903 does not apply of its own force to air transportation.

(a) The expressed intent of Section 7 of the Air Commerce Act of 1926 is that the immigration laws, even if by their terms applicable to air transportation, shall apply only if and to the extent determined by regulations of the Secretary of Labor.

When Congress, in 1926, came to enact a statute governing air commerce, there was already existing a considerable body of laws relating to immigration, customs and public health, and entry and clearance of vessels. These laws, of course, had been framed in the light of the modes of transportation existing at the respective dates of their enactment and took no account of the peculiarities of air transportation. While it was clearly necessary to have some provisions regulating air transportation in these respects, it was equally clear that blanket application of some or all of these laws might have a hampering effect upon the development of air commerce.

Congress dealt with this problem by enacting Section 7 of the Air Commerce Act of 1926, entitled "Application of Existing Laws Relating to Foreign Commerce." (This

title was supplied not by the compilers of the Code but by Congress itself—44 Stat. 572.) The Section is divided into subsections (a), (b), (c) and (d). Subsection (a) provides that the navigation and shipping laws, including any definition of "vessel" or "vehicle" found therein, shall not be construed to apply to aircraft. Subsection (b) deals with the application of customs and public health laws. Subsection (c) deals with the application of laws relating to entry and clearance of vessels. Subsection (d) deals with the application of laws relating to immigration. The last three subsections authorize the Secretary of the Treasury, the Secretary of Commerce and the Secretary of Labor "by regulation to provide for the application to civil air navigation of the laws and regulations" relating to customs and public health, entry and clearance of vessels, and immigration, respectively, "to such extent and upon such conditions as he deems necessary."

It is difficult to see how anything could be clearer than that Congress, by providing that these laws were to be applicable to aircraft to such extent and upon such conditions as the respective Secretaries deemed necessary, manifested an intention that the laws should *not* be applicable of their own force, regardless of whether they otherwise would be fairly applicable by their terms. Congress' action may be viewed either as an interpretation of the laws as never having been intended to apply to aircraft, or as a mandate that they should not thereafter apply in the absence of regulations making them applicable. *Alexander* v. *Alexandria,* 9 U. S. (5 Cranch) 1, 7; *Swigart* v. *Baker,* 229 U. S. 187, 197; *Great Northern Ry. Co.* v. *United States,* 315 U. S. 262, 277.

The Secretary of Labor himself has in effect acknowledged that the immigration laws are not applicable of their own force by issuing Rule 5A2 (set out above, pages 11-12)

entitled "Application of the Immigration Laws and Regulations to Civil Air Navigation as Authorized by the Air Commerce Act of 1926," and providing that aircraft engaged in foreign commerce with non-contiguous countries shall, for the purpose of the immigration laws and regulations, be treated as vessels.

The majority of the Circuit Court of Appeals, in holding that Section 9 of the Immigration Act of 1903 applies of its own force to aircraft, based its decision solely on an interpretation of the language of that Section and wholly ignored the fact that, whatever the language, the application of Section 9 is prevented by the clear demonstration of a contrary Congressional intent in Section 7 of the Air Commerce Act.

(b) Section 9 of the Immigration Act of 1903 is not by its terms fairly applicable to the present case.

However, even on the approach which the majority of the Court of Appeals took to the case, its interpretation of Section 9 of the Immigration Act is, as shown in Judge Hutcheson's dissenting opinion, indefensible.

The first part of Section 9, which has remained unchanged since it was enacted, provides that "It shall be unlawful for any person, including any transportation company other than railway lines entering the United States from foreign contiguous territory, or the owner, master, agent, or consignee of any vessel, to bring to the United States" aliens afflicted with certain diseases or mental defects.

As a preliminary matter, it is clear that an airplane is not a "vessel" within the meaning of the statute. This Court held in *McBoyle* v. *United States*, 283 U. S. 25, that an airplane was not a "vehicle" within the meaning of the National Motor Vehicle Theft Act because the use of the

word "vehicle" evoked in the common mind only the picture of vehicles moving on land. Similarly, in the present case, an airplane cannot be deemed to be a "vessel" within the meaning of the 1903 statute, because the use of the word "vessel" evokes in the common mind only the picture of a craft moving upon water, and not through the air. Certainly this was true in 1903 at the time of the enactment of the Immigration Act. As stated by Mr. Justice Holmes in the *McBoyle* case, "the statute should not be extended to aircraft, simply because it may seem to us that a similar policy applies, or upon the speculation that, if the legislature had thought of it, very likely broader words would have been used."

There is, of course, no question that Pan American Airways, Inc. is both a "person" and a "transportation company". In the case at hand, however, involving a flight from Nassau, Bahamas, it was not "entering the United States from foreign contiguous territory." Unless this qualifying phrase in Section 9 is confined to "railway lines", the statute therefore does not apply.

We think it is evident that, in spite of the absence of a comma after "railway lines", the phrase "entering the United States from foreign contiguous territory" was not intended to qualify merely the words "railway lines." There would have been no need for the qualification if these words were all that were intended to be modified. There is no way by which railway lines can enter the United States *except* from foreign contiguous territory, and use of the qualifying phrase would have been pure surplusage if it were intended merely to limit the words "railway lines."

It is clear, therefore, that the phrase must be construed as qualifying at least the words "any transportation com-

pany" as well as the words "railway lines." That is enough for petitioners, since it is inconceivable that Congress could have intended, on the one hand, to limit its reference to transportation companies by this phrase and, on the other, to comprehend them within the generality of the term "any person."

While it is unnecessary to go farther, we think the only sensible construction of Section 9 is to construe the phrase "entering the United States from foreign contiguous territory" as qualifying also the words "any person." This would clearly be so if the words "including any transportation company other than railway lines entering the United States from foreign contiguous territory, or the owner, master, agent, or consignee of any vessel" were intended as a definition of the phrase "any person." This may well have been the intention, as would appear from the references in the second and third sentences of Section 9 to "any *such* person," which could only mean a person as defined and limited in the first sentence of the section. However, even if the words "any person" were intended to include persons other than those specifically mentioned in the first sentence of the section, the phrase "entering the United States from foreign contiguous territory" should be taken as qualifying the words "any person" as well as the words "transportation company" and "railway lines." In other words, the beginning of Section 9 must be construed as reading "any person, including any transportation company, other than railway lines, entering the United States from foreign contiguous territory."

Any broader construction of the words "any person" would make the "any person" clause cover the subject-matter of the "or the owner, master, agent, or consignee of any vessel" clause, which it plainly was not intended to do. As pointed out in Judge Hutcheson's dissenting opin-

ion, it is common for customs and immigration acts and regulations to contain two distinct provisions, one dealing with bringing in aliens from foreign contiguous territory, and the other with bringing in aliens by water. (In this connection, Judge Hutcheson referred to 8 U. S. C. A., Sections 216 and 217. See also *United States* v. *Hunter*, 80 F. (2d) 968, for a full discussion of the distinction between "contiguous" and "non-contiguous" territories.) Section 9 of the Immigration Act of 1903, as amended, followed this same scheme, and applied to two general classes:

(1) "any person, including any transportation company other than railway lines entering the United States *from foreign contiguous territory,*" and

(2) "the owner, master, agent, or consignee of any vessel" bringing in aliens "from a foreign country or any insular possession of the United States."

In construing Section 9 and other customs and immigration laws, it must be remembered that at the time of the enactment of these statutes there were only two means of bringing aliens into this country. One was by bringing them overland from contiguous territories, namely, Mexico and Canada, which was covered in the first part of Section 9; the other was by bringing them in by vessel, which was covered by the second part of Section 9. Transportation from a non-contiguous territory by any means other than vessels was not contemplated or covered by the wording of the statute.*

* It may be noted that the practical distinctions between transportation from contiguous territory and transportation from non-contiguous territory, so important in the case of other forms of transportation, have relatively little application to air transportation. This is another demonstration of the wisdom of Congress in providing that these laws should not be applicable to air transportation of their own force.

Thus, the statute applies only to (a) the transportation of aliens from foreign contiguous territory, except by railway, and (b) the transportation of aliens from non-contiguous territory by vessel. The transportation here in question, from Nassau, Bahamas, was not in the first category because it was not from contiguous territory, and it was not in the second category because it was not by vessel.

It should be noted that even if the Circuit Court of Appeals had been otherwise correct in holding that Section 9 of the Immigration Act of 1903 is applicable of its own force, it overlooked the fact that this is not a suit to collect a penalty as such, but an action to enforce a bond which petitioner Pan American Airways, Inc. was required to furnish as a condition to obtaining clearance papers pending a determination of its liability for any violations of the immigration laws in the course of its operations. If, as held by the Circuit Court of Appeals, the sole basis for liability were Section 9 of the Immigration Act, there would be no ground for requiring or enforcing a bond, because the only provision of Section 9 whereby a bond may be required and enforced applies solely to the owner of a "vessel." Under the *McBoyle* case an aircraft is not a vessel within the meaning of the Immigration Act itself. Hence the only source of liability on the bond is the regulation (5A2) issued pursuant to the Air Commerce Act providing that aircraft are to be treated as vessels. Under the Air Commerce Act, however, the penalty is limited to $500 as we shall now show.

II. Since liability arises solely from the regulation made by the Secretary of Labor under the provisions of Section 7 of the Air Commerce Act, the maximum penalty of $500 provided in Section 11(b) of that Act applies.

As heretofore pointed out, Section 7 of the Air Commerce Act of 1926 provides that the Secretaries, respectively, of the Treasury, Commerce and Labor may, by regulation, provide for the application to civil air navigation of the laws relating to customs and public health, the entry and clearance of vessels and immigration, to such extent and upon such conditions as may be deemed necessary. Section 11(b), prescribing penalties, then provides:

> "(b) Any person who (1) violates any provision of subdivision (a) of this section or any entry or clearance regulation made under section 7, or (2) any customs or public health regulation made under such section, or (3) any immigration regulation made under such section, shall be subject to a civil penalty of $500 which may be remitted or mitigated by the Secretary of Commerce, the Secretary of the Treasury, or the Secretary of Labor, respectively, in accordance with such proceedings as the Secretary shall by regulation prescribe."

The close correlation between, on the one hand, the subjects mentioned in Section 7, authorizing the respective Secretaries to make the laws referred to applicable to air navigation, and, on the other, the subjects mentioned in Section 11(b), leaves room for no other conclusion than that Congress, in enacting the provisions in Section 11(b) prescribing the penalty for violation of regulations made under Section 7, had reference to regulations making applicable to air navigation the laws referred to in Section 7. This

was recognized by the Secretaries of the Treasury and of Commerce, each of whom, in making applicable the laws relating to customs and the entry and clearance of vessels, prescribed that breach of any of the laws so made applicable shall subject the offender to a penalty of $500 in accordance with the Air Commerce Act (1941 Supplement to Code of Federal Regulations of the United States, Title 19 Customs Duties, § 410(b) and (c); Code of Federal Regulations of the United States, Title 14 Civil Aviation, §§ 94.17 and 94.20).

The Secretary of Labor, alone among the Secretaries to whom authority was delegated by Section 7, attempted to apply a different penalty than that provided for in Section 11(b) by prescribing (in Rule 5G1) that the penalty shall be $500 except when a different penalty is provided under the statute which is applicable by the regulation.

The District Court (R. 24), while agreeing with petitioners' contention that Section 9 of the Immigration Act has no application to air transportation except in so far as made applicable by regulation, upheld the Secretary of Labor's interpretation that the penalty limitation of Section 11(b) does not apply to a regulation making applicable a law carrying its own penalty as distinguished from a regulation not incorporating any existing law. This disregards the facts: (a) that the immigration laws are not applicable of their own force, but only by virtue of the regulation (5A2) made by the Secretary of Labor under Section 7 of the Air Commerce Act declaring that an aircraft entering the United States except from Canada and Mexico shall be deemed a vessel for the purposes of the Immigration Laws and Regulations; (b) that when so made applicable to air commerce *by regulation*, the immigration *laws* have as to air commerce only the force of *regulations;* (c) that Pan

American Airways, Inc. therefore did not violate a law but only a regulation made under Section 7; and (d) that Section 11(b) universally and without exception provides for a maximum penalty of $500 for violation of any regulation made under Section 7. Such a construction is far more consistent with the obvious intent of Congress to create uniformity than is the view taken by the District Court.

CONCLUSION

A writ of certiorari should be granted

Respectfully submitted,

HENRY J. FRIENDLY,
Counsel for Petitioners.

J. E. YONGE,
RUPERT WARREN,
Of Counsel.